TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~197~~. 265

HENRY C. YEAGER AND JOHN CRANGLE, PLAINTIFFS IN ERROR,

vs.

ASA FARWELL, HENRY N. FARWELL, AND SAMUEL HALL, JR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

FILED OCTOBER 24, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 497.

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vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

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1 MISSOURI DISTRICTS, *set:*

Pleas before the honorable circuit court of the United States for the districts of Missouri, at the April term thereof, A. D. 1870.

ASA FARWELL ET AL., PLAINTIFFS,
ag'st
HENRY C. YEAGER ET AL., DEFENDANTS. } Assumpsit.

Be it remembered that heretofore, to wit, on the sixteenth day of March, A. D. 1870, there was filed in the office of the clerk of the circuit court of the United States for the districts of Missouri the following declaration, to wit:

Declaration.

UNITED STATES OF AMERICA, *Districts of Missouri:*

In the United States circuit court for Missouri, April term, 1870.

Asa Farwell, Henry N. Farwell, & Samuel Hall, jr., who are citizens of the State of Massachusetts, doing business at Boston, in that State, as partners, under the name & style of A. G. Farwell & Co., complain of Henry C. Yeager and John Crangle, who are citizens of the State of Missouri, lately doing business at St. Louis, as partners, under the name of Yeager & Co., of a plea of trespass on the case on promises:

For that heretofore, to wit, on the fifteenth day of October, in the year eighteen hundred and sixty-six, at St. Louis, in the district of Missouri, one C. H. Kerckhoff, a citizen of the State of Missouri, by his promissory note of that date, promised to pay to the order of himself, one year after the said date, fifteen thousand seven hundred and fifty dollars, for value received, negotiable and payable, without defalcation or discount, with interest from maturity at ten per cent. per annum, payable at the office of A. G. Farwell & Co., Boston, in the State
2 of Massachusetts, which note is to the court here produced and shown. And at the same time the said Kerckhoff executed and delivered to said defendants a deed of trust to secure the payment of said note, and endorsed and delivered the said note to the defendants for value, and defendants then and there endorsed and delivered said note for value to the plaintiffs. And afterwards, to wit, on the eighteenth day of October, 1867, when said note became and was due and payable, the plaintiffs caused the same to be presented at the office of A. G. Farwell & Co., at Boston, Massachusetts, & payment thereof to be demanded; but said Kerckhoff did not nor would pay to said plaintiffs the said note nor any part thereof, and defendants then and there had due notice of the said refusal of the said Kerckhoff to pay said note at maturity, and by means thereof became liable themselves to pay the same, and in consideration thereof said defendants, on the said 18th day of October, 1867, specially and expressly promised to pay said note to said plaintiff upon request, and plaintiffs say that there have been paid, on account of said note, various sums of money, reducing the sum due thereon to the sum of four thousand nine hundred and forty $\frac{44}{100}$ dollars, with interest at the rate of ten per cent. from February 24, 1870, which balance of four thousand nine hundred and forty $\frac{44}{100}$ dollars the plaintiffs have frequently requested said defendants to pay to them, to wit, at the district aforesaid; but said defendants have wholly

neglected and refused to pay said balance, or any part of the same, to the plaintiffs.

And whereas also afterwards the said defendants, on the 24 day of February, (1870,) eighteen hundred and seventy, at the district aforesaid, were indebted to the plaintiffs in the further sum of six thousand dollars for so much other money before that time by the plaintiffs lent and advanced to the defendants, at defendants' request, and in
3 the further sum of six thousand dollars for so much money then and there found to be due from defendants to plaintiffs upon an account then and there stated between them; and being so found indebted, the said defendants afterwards, to wit, on the 24 day of February, 1870, in consideration thereof, undertook and promised to pay the same to plaintiffs on request, yet said defendants have wholly failed and refused, though often requested, to pay said sums of money to the plaintiffs, or any part thereof, to the damage of the plaintiffs in the sum of fifteen thousand dollars; wherefore they sue.

THO'S T. GANTT, *P. Q.*

Upon which declaration the following summons was issued, to wit:

Summons.

MISSOURI DISTRICTS, *set:*

The President of the United States of America to the marshal of the eastern district of Missouri, greeting:

You are hereby commanded to summon Henry C. Yeager and John Crangle, citizens of the State of Missouri, that they be and appear before the honorable circuit court of the United States for the districts of Missouri on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said districts, on the first Monday in April next, then and there to answer unto Asa Farwell, Henry N. Farwell, and Samuel Hall, jr., citizens of the State of Massachusetts, in a plea of trespass on the case on promises, to the damage of said plaintiff fifteen thousand dollars. Hereof fail not, and have you then and there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the seventeenth day of March, A. D. eighteen hundred and seventy.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[L. S.] BEN. F. HICKMAN, *Clerk.*

4 Upon the foregoing summons the marshal made the following return, to wit:

Marshal's return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Executed this writ by reading the summons, together with the copy of declaration thereto attached, to the within-named Henry C. Yeager and John Crangle, at St. Louis, in said district, March 17, 1870.

C. A. NEWCOMB,
U. S. Marshal E. D. of Mo.
By J. SAUER, *Deputy.*

And afterwards, at a regular stated term of the circuit court of the United States for the districts of Missouri, begun and held at the city of St. Louis on the first Monday of April, A. D. 1870, the following proceedings were had on Tuesday, the 5th day of April, 1870, to wit:

Plea of non assumpsit filed.

ASA FARWELL ET AL., PLAINTIFFS,
ag'st
HENRY C. YEAGER ET AL., DEFENDANTS. } Assumpsit.

This day come the defendants by attorney, and file their plea of non assumpsit to the action brought by plaintiffs herein against them; which plea, filed as aforesaid, is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA,
Districts of Missouri, ss:

In the United States circuit court, districts of Missouri, April term, 1870.

ASA FARWELL, HENRY N. FARWELL, AND SAMUEL Hall, jr., pl'ffs,
vs.
HENRY C. YEAGER AND JOHN CRANGLE, DEF'TS. } Action of assumpsit.—Plea.

And the said defendants, Henry C. Yeager and John Crangle, by their attorneys, come and defend the wrong and injury when, &c., and say that they did not undertake or promise in manner or form as the said plaintiffs have above thereof complained against *him*; and of this they put themselves upon the country, &c.

(Signed) SLAYBACK & HAEUSSLER,
Att'ys for Defendants.

And afterwards, at said last-mentioned regular stated term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said case on Thursday, April 28th, 1870:

Case heard in part.

ASA FARWELL ET AL., PLAINTIFFS,
ag'st
HENRY C. YEAGER ET AL., DEFENDANTS. } Assumpsit.

This day come the parties by attorneys, and this case being called for trial, and both parties being ready, it is ordered that a jury come; and thereupon come said jury, to wit, Alcibiades Murch, Patrick Carroll, Leonard Henry, James S. Finley, Benjamin Perkins, Ludovicus Weld, Philip A. Smith, Richard Carrol, Christopher B. Houts, Charles A. Caruthers, John H. Watkins, and William W. Howard, twelve good and lawful men, who were sworn well and truly to try the issues joined herein. Thereupon the hearing of said case was commenced, and the same in part heard; and the hearing thereof not being concluded at the hour of adjournment, it is ordered that further proceedings herein be continued until to-morrow morning.

And afterwards, at said last-mentioned regular stated term of the said circuit court, the following further proceedings were had in this case on Friday, April 29th, 1870:

Hearing concluded.

ASA FARWELL ET AL., PLAINTIFFS,
ag'st
HENRY C. YEAGER ET AL., DEFENDANTS. } Assumpsit.

This day come again the parties by attorneys, and also the jury sworn herein, and the hearing of this case was resumed, and said case further heard; and the hearing thereof being concluded, said case was
6 submitted to the jury, who retired to consider of their verdict herein.

And said jury thereafter returned into court the following verdict, to wit:

Verdict.

"We, the jury in the case wherein Farwell & Co., of Boston, are plaintiffs, and Yeager & Co., of St. Louis, Mo., are defendants, find for the plaintiffs, and assess the damages at five thousand and twenty-nine & $\frac{64}{100}$ ($5,029 64) dollars.

"WILLIAM W. HOWARD, *Forema.*"

Judgement.

It is therefore now considered by the court that the plaintiffs, Asa Farwell, Henry N. Farwell, and Samuel Hall, jr., recover against the defendants, Henry C. Yeager and John Crangle, the sum of five thousand and twenty-nine dollars and sixty-four cents, the damages so as aforesaid found to be due and assessed by the jury herein, and also the costs in this behalf expended; and that execution be issued therefor.

MEMORANDUM.—This judgment to bear interest at the rate of ten per cent. per annum, that being the rate of interest agreed upon, as appears from the face of the note sued on herein.

And afterwards, at said last-mentioned regular stated term of the said circuit court, the following further proceedings were had in said case on Monday, May 9th, 1870, to wit:

Supersedeas granted.—Bond filed.

ASA FARWELL ET AL., PLAINTIFFS,
ag'st
HENRY C. YEAGER ET AL., DEFENDANTS. } Assumpsit.

It is ordered that a supersedeas be granted, staying all further proceedings upon the judgement heretofore rendered in this case, a writ of error having been allowed to the Supreme Court of the United States, and a bond, with sureties, executed and approved, as required by law.

And the bond filed as aforesaid is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, John Crangle, as principal, and Christian A. Kuhl and Thomas Morrison, as sureties, are held and firmly bound unto Asa Farwell, Henry N. Farwell, and Samuel Hall, jr., in the full and just sum of ten thousand dollars, to be paid to the said
Asa Farwell, Henry N. Farwell, and Samuel Hall, jr., their heirs,
7 executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this ninth day of May, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately, at the April term (A. D. 1870) of the circuit court of the United States for the districts of Missouri, in a suit depending in said court between Asa Farwell, Henry N. Farwell, and Samuel Hall, jr., plaintiffs, and Henry C. Yeager and John Crangle, defendants, judgement was rendered against the said defendants, Henry C. Yeager and John Crangle; and the said Henry C. Yeager and John Crangle having obtained a writ of error of the said court to reverse the judgement in the aforesaid suit, and a citation directed to the said Asa Farwell, Henry N. Farwell, and Samuel Hall, jr., citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Henry C. Yeager and John Crangle shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

JOHN CRANGLE. [SEAL.]
CHRISTIAN A. KUHL. [SEAL.]
THO'S MORRISON. [SEAL.]

Sealed and delivered in presence of—

Approved by—

SAMUEL TREAT.

And afterwards, at said last-mentioned regular stated term of the said circuit court, the following further proceedings were had in this case on Saturday, May 28th, 1870, to wit:

Bill of exceptions filed.

ASA FARWELL ET AL., PLAINTIFFS,
ag'st
HENRY C. YEAGER ET AL., DEFENDANTS. } Assumpsit.

8 This day come the defendants by attorney, and file their bill of exceptions to the ruling of the court in this case, which, being examined and approved by the court, is signed, sealed, and ordered to be made part of the record herein.

The bill of exceptions filed as aforesaid is in the words and figures following, to wit:

Bill of exceptions.

UNITED STATES OF AMERICA, *Districts of Missouri, ss:*

In the United States circuit court, districts of Missouri, Ap'l T., 1870.

ASA G. FARWELL ET AL. }
vs. } Bill of exceptions.
HENRY C. YEAGER ET AL. }

Be it remembered that, at the trial of this case, the plea being non assumpsit, before any evidence was adduced, the defendants admitted the endorsement upon the note in controversy was made by them, but claimed, as an affirmative defense, that their signature was placed thereon at the instance and special request of plaintiffs, after said note had passed into the possession of plaintiffs, solely as an accomodation to plaintiffs, without any value or consideration whatsoever; and defendants therefore moved the court for the right to open and close the case; which motion the court overruled, and to this ruling of the court defendants at the time duly excepted.

And be it further remembered that thereupon the trial progressed, and plaintiffs offered in evidence the note sued upon, together with the credit and indorsement thereon.

And be it further remembered that thereupon plaintiffs offered in evidence, as proof of a waiver of protest, a letter dated at St. Louis, Mo., Oct. 18, 1867, written by defendants to plaintiffs on the same day that the note sued upon became due; and to the introduction of
9 the said letter as evidence of such waiver, the defendants at the time objected on the ground that such letter could not, in the nature of things, have reached Boston, the place where said note by its terms was payable, until after said note would fall due and a failure to protest the same would occur, if the same were not protested. Said note was not protested. It was admitted that the note described in the declaration was the same referred to in said letter. This objection the court overruled, and to this ruling of the court in admitting said letter for such purpose the defendant at the time excepted then and there in due form.

And said letter was thereupon read, the defendants' objections to the contrary notwithstanding, in words and figures as follows, to wit:

"ST. LOUIS, *Oct'r* 18, 1867.

"Messrs. A. G. FARWELL & CO., *Boston.*

"GENTLEMEN: Mr. Kerkhoff fully expected to be able to place funds in our hands in time for us to have them with you to-day to meet his note of $15,000, but owing to the stringency of money market, he has been unable thus far to complete arrangements to raise the money, so as to have it in your hands to-day; but in a week or ten days it will be forthcoming, and he assures us it will be done without fail, and feels very sorry that circumstances were such as to prevent his meeting the note at maturity. We also feel very much annoyed about it, but we have the comforting assurance in our breasts that you can readily understand the difficulty there is in raising so large an amount, here in the West at least, where money is so scarce, and so much required to move the crops. But we hold ourselves responsible for the payment of this note, and shall see that it is done at an early day. Thanking you for your many acts of kindness to us, we are yours, very truly,

(Signed) "YAEGER & CO."

10 And here the plaintiffs rested.

JOHN CRANGLE, one of the defendants, testified that defendants did part of the business of Obermeyer & Co., but couldn't say they did all of it; but all of Obermeyer & Co.'s flour that came into defendants' hands for shipment was sent to plaintiffs.

And be it further remembered that thereupon the defendants offered evidence to show that Obermeyer & Co. and C. H. Kerkhoff meant the same firm, Kerkhoff being the company of that concern; that Farwell & Co. were com. merchants and capitalists of Boston, Mass.; that Yeager & Co. were commission merchants of St. Louis, dealing principally in flour, and had for years been in active correspondence and doing business with Messrs. F. & Co.; that in A. D. 1866 Obermeyer & Co., of St. Louis, who had just completed a large flouring-mill, needed money to carry on their business, and offered as security, for a loan of $15,000, a farm of 500 acres forty miles from St. Louis.

It further appeared that Yaeger & Co., who were friends of Obermeyer & Co., submitted these facts by letter to plaintiffs, and solicited said loan for said O. & Co., and suggested, as an additional inducement, that if the loan should be made by Farwell & Co. to Obermeyer & Co., upon the security of the farm, as desired, that they, Farwell & Co., would receive a large share of the product of the new mills of Obermeyer & Co., the latter having offered to make that arrangement with any Eastern house who would make the desired advance.

It further appeared that Yaeger & Co. recommended by letters the arrangement to Messrs. Farwell & Co., and urged the sufficiency of the security offered. Sept. 19, 1866, the following letter of Yaeger & Co. was sent to plaintiffs:

"We carefully note your remarks about the loan to Mr. O. But, in the first place, his security is not city property, but a farm of
11 500 acres of land, 40 miles from the city, worth $50 per acre, and the terms of the interest are too high, 13 per cent. per annum. We should be glad if you could make the loan at ten per ct. on the security above mentioned for say one or two years, or even one year, after which we would make the advance ourselves. Please consider the matter carefully, dear sirs, and bear in mind that you will get a large share of the business of the mill. Sale of Richland Co. at 14½ very satisfactory. Hoping to hear from you soon, and that you will come to a favorable conclusion on our proposition for Mr. O., we are, &c.,
(Signed) "Y. & CO."

It further appeared in evidence that Farwell & Co., on Sept. 25th, 1866, to the above letter sent the following reply:

"BOSTON, *Sept.* 25, 1866.

"Messrs. YAEGER & Co., *St. Louis.*

"GENTLEMEN: We have at hand your valued favors 19th & 20th inst., cov'g B. L. flour, as named, which will be properly cared for on arrival. Your $4,000 draft has due honor, and we note all your remarks with interest. We have further considered the matter of loan to Mr. Obermeyer, and have concluded to vary our previous proposition, so as to come as near your wishes as we can; and, first and foremost, we want to feel that the land (500 acres) is good and ample security beyond a question, (and for that certainty we rely upon you;) that being so, we will loan the money for one year, at the rate of 12 per ct. per annum. This rate of interest in itself is no object, for we can use our money to better advantage here; but desiring very much to accommodate you, and for the further consideration of getting a large share of the busi-

ness of Mr. Obermeyer's mill, we are willing to loan the money on above terms, but shall be very glad if you can obtain the money cheaper.

(Signed) "A. G. FARWELL & CO."

12 It further appeared in evidence that, on the 15th day of Oct., 1866, C. H. Kerkhoff executed the note sued upon, and a deed of trust to secure the same, wherein Henry C. Yaeger was made trustee, and the plaintiffs were the cestuis que trust conveying the farm of 500 acres aforementioned.

It further appeared in evidence that plaintiffs had duly received by mail a letter written by defendants, dated at St. Louis, Oct. 24th, 1866, from which the following extract relates to the matter in hand:

"Mr. O. is now getting the deed of trust recorded, and will soon have it ready and forward to you. He will require the money in about a week or ten days, if that will be convenient for you. We have now advanced him $3,000 on it, and he will probably require more on Saturday," &c.

(Signed) "Y. & CO."

It further appeared in evidence that plaintiffs received by mail the following letter from defendants, to wit:

"ST. LOUIS, *Nov.* 27, 1866.

"Messrs. FARWELL & Co., *Boston.*

"GENTLEMEN: After a long delay we now beg to hand you the deed of trust on land of Mr. Kerkhoff, partner of Mr. Obermeyer. By mistake the words, "mill, machinery, &c.," were inserted in the deed, but you will perceive that they are erased, or made of no effect. It was the attorney's error, and was not noticed until after the deed was recorded, else we should have had it written over again. However, the supernumerary words will not injure it in any respect. It may be that Obermeyer & Co. may want to draw the money just as they need it. If so, would that be as convenient to you as to have them get it all at once, and would you charge them interest only on these installments from the date the money was paid them? We have advanced them
13 nearly $4,000 already.

"Please give this matter your usual kind attention, & oblige y'rs, &c.,

(Signed) "Y. & CO."

It further appeared in evidence that to this letter plaintiffs replied as follows:

"BOSTON, *Nov.* 30, 1866.

"Messrs. YEAGER & Co., *St. Louis.*

"GENTLEMEN: We have your val'd favor 27th inst., cov'g deed of trust, &c., and we carefully note your remarks. We don't know that the superfluous words will do any harm in the deed, but we observe that it is made in favor of Henry Farwell, whereas it should be Henry N. Farwell, and we return the deed to have that correction made, that is, to have the letter N inserted. We observe that the notes are made at the rate of 10 per ct. interest per annum, while our proposition was 12 per ct. per annum, as you will see by our letter of Sept. 25th, and if the parties prefer not to make new notes, Messrs. Obermeyer & Co. will remit the 2 per ct., or draw that much less upon us. And, too, we will

thank your Mr. Yeager to endorse the notes in name of your firm, or his individual name, as may be preferred; this will do him no harm, and will be an accommodation to us. It will suit us quite as well for Messrs. Obermeyer & Co. to draw the money along as he may want it. In fact, we shall prefer to have them do so, and we would be glad to have them draw in sums of $2,000 to 3,000 along as they may need it, and we shall not charge them interest on the installments until we pay the money. We presume there will be no difficulty in inserting the letter N both in the deed and upon the record, and we think best to have it made right in the beginning. The m'k't continues perfectly quiet, & money in more demand.

"Very truly, yours,
(Signed) "A. G. FARWELL & CO."

14 And be it further remembered that thereupon defendants called as a witness—

HENRY C. YAEGER, who, being duly sworn, testified to divers matters pertaining to said cause until he was asked the following question:

"Q. State the consideration and the circumstances under which the endorsement of the firm name of Yaeger & Co. was placed upon the note in controversy."

Which question was objected to by the plaintiffs on the ground that the whole of the negotiations had been conducted by written correspondence between the parties, which was then in court, and the objection was sustained. And to this ruling of the court, in excluding the testimony responsive to said inquiry, the defendants at the time, by their counsel, duly excepted.

"Q. When was that endorsement placed upon the note sued upon?
"A. It was not until after we had received the plaintiffs' letter of Nov. 30th, 1866, but the exact date I cannot fix without reference to our letter-book.
"Q. What consideration, if any, was the basis of your letter of Oct. 18, 1867?"

This question was objected to by the plaintiffs on the ground that the negotiations were in writing, and plaintiffs did not ask to recover on the ground that defendants were guarantors, but solely on the ground that they were indorsers, and upon no other, and thereupon the court excluded the testimony; and to this ruling of the court the defendants at the time duly excepted.

This witness further testified that, after the transaction about the loan of the $15,000, Obermeyer & Co. did ship direct by consignment to Farwell & Co., of Boston, the bulk of the flour manufactured by O. & Co.; and that, after that transaction, Yaeger & Co. did not ship or handle a barrel of it; and that they (Y. & Co.) never received a cent for negotiating between the parties, nor had he (the witness Yaeger)
15 ever received a cent; that, as trustee, he has sold the farm hypothecated, and had accounted to plaintiffs for the amount it brought at the sale, which was the amount the note had endorsed on it as a credit of date Feb. 24th, 1870; and that, owing to the decline in the value of the property, it had sold below its worth.

On cross-examination:

The witness stated he had always considered the property ample security for the amount of $15,000, and that he believed it worth more

to-day; that he had no interest whatever in Obermeyer & Co., and that he was as friendly to one party as to the other; that he thought he was acting for their mutual benefit. It was a public sale and duly advertised according to the terms of the deed of trust. The witness acknowledged the genuineness of the following letter, which plaintiffs' counsel here offered and read in evidence, to wit:

"ST. LOUIS, *Sept.* 11*th*, 1867.

"Messrs. A. G. FARWELL & Co.

"GENTS: Please send us by return mail the deeds of trust, &c., which we sent you last year." (Here follows matters not relative to this suit.)

"Very truly, yours,
(Signed) "YAEGER & CO."

Also the following:

"ST. LOUIS, *Sept.* 16*th*, 1867.

"Messrs. A. G. FARWELL & Co., *Boston.*

"GENTLEMEN: Mr. Kerkhoff wishes to know if you are willing to renew his note for one more year. Please give us your answer as soon as possible." * * (Here follows matter not relative to this suit.)

"Very truly, yours,
(Signed) "YAEGER & CO."

To which letters it further appeared in evidence the following reply was received by defendants:

"BOSTON, *Sept.* 20*th*, 1867.

16 "Messrs. YAEGER & Co., *St. Louis.*

"GENTLEMEN: We wrote yesterday enclosing deed of trust, &c., and now have at hand your val'd favor 16th inst., carefully noting your remarks; and in regard to renewing Mr. Kerkhoff's note for another year, we feel obliged to say that it will not be convenient for us to do so. Having made heavy money engagements for the fall, we shall require all the money we can command. If it were convenient we should be glad to accommodate Mr. K.; but, as we are situated, we shall need the money when the note becomes due." * * (Here follows matter not pertinent to this suit.)

"Very truly, yours,
(Signed) "A. G. FARWELL & CO."

Cross-examination continued:

"The money spoken of as advanced by Yaeger & Co. to Obermeyer & Co. was none of it advanced until after Farwell & Co. had agreed to make the loan as mentioned in the correspondence. I am pretty certain a part of it had been advanced by Yaeger & Co. before the note was endorsed by Yaeger & Co. I cannot state exactly the amount without examining my books. It was done solely on the strength of that letter of Sept. 25th, 1866. We had no money to loan, and we got no benefit from it except to accommodate the parties."

And thereupon defendants rested their case.

And be it further remembered that plaintiffs, in rebuttal, thereupon produced and offered in evidence the following letter, to which defend-

ants objected on the ground that the same was not competent; which objection the court overruled, and to this ruling of the court the defendants, by their counsel, at the time duly excepted; which letter plaintiffs thereupon read to the jury as follows, to wit:

"ST. LOUIS, *Dec.* 10, 1866.

"Messrs. FARWELL & CO., *Boston.*

"GENTLEMEN: Enclosed please find deed of trust, notes, &c., of C. H. Kerkhoff, (partner of Mr. Obermeyer.) It is understood that
17 12 per ct. per a. is the rate of interest, but it would not be advisable to put over 10 per ct. in deed & note, and they will draw for so much less. The amount advanced to Messrs. Obermeyer & Co. by us from time to time is $4,329 70; for this we made draft on you to-day at 30 days, so please do not charge this to our account. Messrs. O. & Co. will draw for balance, as wanted, at 60 days sight." * * * (Here follows matter not pertinent to this suit.)

"Yours, very truly,

(Signed) "YAEGER & CO."

And plaintiffs proved that said draft for $4,329 70 was paid by them, and was the first money by them paid on said loan; that, Dec. 10, 1866, they advanced $2,000; Jan'y 2nd, 1867, $6,000; Jan'y 23d, 1867, $2,330 29; all of which advances were made to Obermeyer & Co. on drafts forwarded to plaintiffs by defendants.

And the plaintiffs here closed in rebuttal; and this was all the testimony in the case material to the matters now in controversy.

Be it further remembered that thereupon the counsel for the defendants and for the plaintiff having been heard upon the facts herein proved, the defendants, by their counsel, asked the court to charge the jury as follows:

"The jury are instructed that, even if they believe defendants were endorsers on the note in question, still they are not liable thereon, unless the same was presented for payment at the time of its maturity, & at the place where it was made payable & payment thereof demanded, and was afterwards duly protested for non-payment, & notice of such demand, refusal, & protest given to the defendants; & unless they believe these acts were done, they should find for the defendants, unless they further believe from the evidence that defendants promised to pay the note in question after its maturity, & after they knew the same had not been duly presented, payment demanded, & protested."

18 "If the jury believe from the evidence that defendants endorsed the note in question at the request of and for the accommodation of plaintiffs, and without any consideration either from the maker of said note or the plaintiffs, then they will find for the defendants."

"The jury are instructed that the plaintiffs, in order to relieve themselves from the necessity of giving notice to the defendants of the non-payment of the note sued on, must show a waiver of the right on the part of Yaeger & Co., either express or implied, to demand such notice, or a promise to pay such note after its dishonor, with a knowledge of the facts of its presentment for payment and dishonor, or failure of plaintiffs to present said note for payment."

"The court instructs the jury that a mere moral or conscientious obligation on part of defendants to be responsible for the payment of the note in question, unconnected with any prior legal or equitable

claim or demand held by plaintiffs against defendants, & given or made without any consideration, is not enough to support a promise to pay and make defendants liable as endorsers on the note sued on."

"In order to hold defendants liable as guarantors of the note sued upon, the plaintiffs must show that they notified defendants of the fact that their guarantee was accepted by the plaintiffs, and defendants are not liable upon such guaranty unless such notice has been shown."

Which the court refused, and to this ruling of the court the defendants at the time duly then & there excepted.

Be it further remembered that immediately thereupon the court (plaintiffs disclaiming all demand on defendants as guarantors) did charge the jury as follows, to wit:

"ASA FARWELL ET AL.
"*against*
"HENRY C. YEAGER ET AL.

19 "The jury are instructed that if Yeager & Co. placed their names on the back of the note in question before the negotiations for the loan by the plaintiffs was closed, or before the plaintiffs advanced any money on said loan, then the defendants are liable as endorsers."

And to this ruling of the court in so charging the jury the defendants at the time duly excepted, in that said charge did not submit the questions of waiver of notice, demand, & protest to the jury, or the question of consideration, or any other question, except as to the time when the advances were made on the loan.

Be it remembered that thereupon the jury retired, and, after having duly considered of their verdict, did then and there find as follows, to wit: (See page 6 of this transcript.)

Be it further remembered that thereupon the defendants, by their counsel, demanded that the jury be polled, which was accordingly ordered by the court, and, upon being called by name and asked, "Is this your verdict?" two of said jury, to wit, Leonard Henry and James S. Finley, each and separately at the call of their respective names, answered, "No, it is not my verdict."

Be it further remembered that thereupon the court required of Leonard Henry, "Why is it not your verdict?" And the said juror thereupon answered, "Because I believe the plaintiffs had advanced money on that loan before the note was indorsed by the defendants." And in answer to a similar question the other juror, James S. Finley, said it was not his verdict for the same reason. Thereupon the court informed the jury that would have to retire and consider further of their verdict, and that if the dissenting jurors wished to call for any part of the testimony in the case they could do so, and take any of the letters which had been read in evidence with them to their room,

20 and satisfy themselves; and to this ruling of the court the defendants' counsel then and there at the time duly excepted.

And be it further remembered that thereupon plaintiffs' counsel suggested, in hearing of the jury, that the letter of defendants to plaintiffs of Dec. tenth, (10th,) 1866, contained the desired testimony; and thereupon the court called for that letter, and read the same aloud to the jury, and commented on the same, and to this action of the court the defendants by their counsel at the time then and there excepted.

And be it further remembered that thereupon the court proceeded to further charge the jury as follows:

"This letter says: 'The amount advanced to Messrs. Obermeyer &

Co. by us from time to time is $4,329 70.' It does not say by Farwell & Co., but by us, the witness, Yaeger & Co.; and it is not advances made by Yaeger & Co., previous to the endorsement, which you are specially to consider, for in such case this loan might have only been brought about by Yaeger & Co. that they might get back what they had themselves advanced to Obermeyer; but you must find that advances were made by Farwell & Co. previous to the time Yaeger & Co. endorsed the note, or you will find for the plaintiffs. The real question is, whether plaintiffs concluded the negotiations for the loan, and took the note and deed of trust in question as their security without the endorsement of defendants, or whether they withheld all advances until defendants became endorsers. You can now take that letter with you to your room and study it over for yourselves, and consider further if you can agree upon a verdict. I say again if the advances were not made by Farwell & Co. before the endorsement, then defendants are liable as endorsers, there having been a waiver by them of protest."

21 And to this charge of the court the defendants at the time then and there excepted, on the grounds that the same was not supported by the testimony; that it was calculated to mislead the jury; that it was out of time, and that it was against the law and the evidence, and the weight of the evidence in the case; and on divers other good and sufficient grounds; which objection the court overruled, and to this ruling of the court the defendants then and there at the time, by their counsel, duly excepted.

And be it further remembered that thereupon the defendants by their counsel asked the court to submit to the jury, for their consideration in retirement the hypothesis, "unless such advances were made by Yaeger & Co., as agents for Farwell & Co." Whereupon the court remarked, the jury could judge if such testimony had been given, but for his part he had heard nothing of the sort; yet the jury must rely upon their own memory; and to this the defendants, by their counsel, at the time duly excepted.

And be it further remembered that thereupon defendants asked that the other letters read in evidence in the trial might be taken by the jury, which the court said was unnecessary, unless the jury desired them, in which event they could take them; and to this ruling of the court the defendants, by their counsel, at the time duly excepted.

And be it further remembered that thereupon the defendants, by their counsel, moved the court to set aside the verdict as a mistrial, the jury having reported it was their verdict, when it was not; whereupon

22 the court held it was no mistrial, but was the same as if the jury had failed to agree, and that, if necessary, they could be kept together until they did agree; and to this ruling of the court the defendants, by their counsel, at the time duly excepted.

And be it further remembered that thereupon the jury, for the second time, retired, taking with them the letter of Dec. 10th, 1866, which had been read and commented upon by the court in their hearing, and no other, and thereafter did return with the following verdict, to wit, (see page 6 of this transcript,) which was received by the court; and to this ruling of the court the defendants at the time duly excepted.

And be it further remembered that afterwards, by reason of said second finding of the jury, the court caused a judgement to be entered up against defendants in words and figures, as follows, to wit: (See page 6 of this transcript.) And to this ruling of the court the defendant at the time duly excepted.

And be it further remembered that afterwards, within due time, to wit, on the day of May, A. D. 1870, the said defendants come and present this their bill of exceptions, and pray that the same may be allowed, and signed, and made a part of the record herein; which is accordingly done.

[SEAL.] SAMUEL TREAT, *Judge.*

23 UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Benjamin F. Hickman, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of Asa Farwell et al., plaintiffs, against Henry C. Yeager et al., defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said districts, this fourteenth day of June, in the year of our Lord eighteen hundred and seventy.

[SEAL.] BEN. F. HICKMAN,
Clerk of said Court.

(Indorsed:) United States circuit court, districts of Missouri. Asa Farwell et al., plaintiffs, against Henry C. Yeager et al., defendants. Duly certified copy of the record and proceedings in the above-entitled cause.

24 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the districts of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the April term A. D. 1870, of said court, between Asa Farwell, Henry N. Farwell, and Samuel Hall, jr., plaintiffs, and Henry C. Yeager and John Crangle, defendants, a manifest error hath happened, to the great damage of the said Henry C. Yeager and John Crangle, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this ninth day of May, in the year of our Lord one thousand eight hundred and seventy.

Issued at office in the city of St. Louis, with the seal of the circuit

court of the United States for the district of Missouri, dated as aforesaid.

BEN. F. HICKMAN,
Clerk C. C. U. S. Missouri Districts.

Allowed by—

SAMUEL TREAT, *Judge.*

25 In obedience to the within writ of error, I herewith transmit the record and proceedings in the within-mentioned case.

Given under my hand this 21st day of October, A. D. 1870.

BEN. F. HICKMAN,
Clerk of the Circuit Court of the United States for the Districts of Missouri.

26 The United States of America to Asa Farwell, Henry N. Farwell, and Samuel Hall, jr., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the districts of Missouri, wherein Henry C. Yeager and John Crangle are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, one of the judges of the circuit court of the United States for the districts of Missouri, this ninth day of May, in the year of our Lord one thousand eight hundred and seventy.

SAMUEL TREAT.

27 I hereby acknowledge service of the within citation in behalf of the said defendants in error, namely, Asa Farwell, Henry N. Farwell, and Samuel Hall, jr., this 21st day of October, 1870.

THO'S T. GANTT,
For A. G. Farwell & Co.

(Indorsement on cover:) No. 497. Henry C. Yeager & John Crangle, plaintiffs in error, vs. Asa Farwell, Henry N. Farwell, and Samuel Hall, jr. Missouri C. C. U. S.

Filed 24th October, 1870.

Supreme Court of the U. S.

HENRY C. YEAGER and JOHN CRANGLE, Plaintiffs in Error, No. 265.
vs.
ASA FARWELL, HENRY N. FARWELL and SAM'L HALL, Jr., Defendants in Error.

In Error to the Circuit Court of the United States for the District of Missouri.

STATEMENT AND BRIEF FOR PLAINTIFFS IN ERROR,

BY GEORGE P. STRONG, *Attorney.*

This is an action of assumpsit upon a promissory note for fifteen thousand seven hundred and fifty dollars, executed by C. H. Kerkhoff, dated October 15, 1866, and payable to his own order one year after date, at the office of A. G. Farwell & Co., Boston, Mass.

The declaration alleges that this note was endorsed and delivered for value by Kerkhoff to Yaeger & Co., plaintiffs in error, and by them endorsed and delivered for value to defendants in Error.

To this declaration defendants below plead the general issue, non-assumsit.

A trial was had, and a verdict and a judgment rendered for defendants in error for the sum of $5,029.64, April 29, 1870, the balance of said note having been paid by the sale, under a deed of trust, of property of the maker.

From the bill of exceptions it appears that Yeager & Co., who were extensivé shippers of flour in St. Louis, and correspondents of Farwell & Co., commission merchants and capitalists in Boston, in writing to the latter firm in September, 1866, on their general business, stated that Obermeyer & Co., a firm composed of Obermeyer & Kerkhoff, had just completed a large flouring mill in St. Louis, and desired a loan

of $15,000 on the security of a farm of 500 acres of land lying about forty miles from St. Louis, and belonging to C. H. Kerkhoff. Yeager & Co., in writing to Farwell, stated as an inducement to make this loan, that Farwell & Co. would receive a large share of the product of the new mills of Obermeyer & Co.

Yeager & Co. advised Farwell & Co. to make the loan, and recommended the security as sufficient. September 19, 1866, Yeager & Co. wrote the following letter:

"We carefully note your remarks about the loan to Mr. O. But in the first place, his security is not city property, but a farm of 500 acres of land 40 miles from the city, worth 50 dollars per acre, and the terms of the interest are too high, 13 per cent, per annum. We should be glad if you could make the loan at ten per cent. on the security above mentioned, for say one or two years, or even one year, after which we would make the advance ourselves. Please consider the matter carefully, dear sirs, and bear in mind that you will get a large share of the business of the mill. * * *

Y. & Co."

Rec. p. 7.

To this letter Farwell & Co. replied September 25, 1866, agreeing to make the loan for one year at 12 per cent., and stating that for the sufficiency of the security they relied on Yaeger & Co. See Letter Rec., p. 7.

This offer of Farwell & Co. was accepted by Kerkhoff, in whose name the business seems to have been transacted. He executed his notes for the amount to his own order, also the deed of trust, and had it placed on record. Henry C. Yaeger was made the trustee in the deed of trust. Rec., p. 8.

Thus it appears that defendants in error had agreed to make the loan; the notes had been executed, the deed of trust had been executed and recorded, and both notes and deed of trust had been delivered to Farwell & Co. and accepted by them *before Yaeger & Co. endorsed the note, and before a word had been said about their endorsing it.*

On the 30th of November, 1866, a month and a half after the note and deed of trust had been executed, the deed recorded, and all the papers sent to Farwell & Co., they write to Yaeger & Co., and request that an omission of the letter

"N," the initial of the middle name of Henry Farwell, be corrected. In this letter, for the first time, Farwell & Co. mention the endorsement of Yaeger & Co., and *request it* in the following words:

"And, too, *we will thank your Mr. Yaeger, to endorse the notes in name of your firm, or his individual name, as may be preferred; this* WILL DO HIM NO HARM, AND WILL BE AN ACCOMMODATION TO US." See letter of Nov. 30, 1866; Rec., p. 8.

The principal note, including six months' interest at ten per cent, matured October 15–18, 1867, and was payable, as stated, at Boston on the 18th October, 1867. The additional interest, two per cent., had been reserved in advance out of the loan.

The note was not presented for payment at the place of payment, nor protested. No notice of demand or non-payment was ever given to the endorsers, Yaeger & Co.

Defendants seek to avoid the discharge which this neglect had effected by the introduction of a letter of Yaeger & Co., written at St. Louis, October 18th, 1867, the last day of grace of the note which was payable in Boston.

This letter was written for Mr. Kerkhoff, explaining why he had not placed the funds in Boston to meet the note on that day. They say: "he (Kerkhoff) assures us it will be done without fail," "in a week or ten days." In conclusion they say: "But we hold ourselves responsible for the payment of this note, and shall see that it is done at an early day." See Rec., p. 6.

Previous to this endorsement by Yaeger & Co., and after the defendants in error had agreed to make the loan, Yeager & Co. had advanced to Obermeyer & Co., on account of this loan, with the knowledge of Farwell & Co., some $3,000 or $4,000. Rec., p. 8.

This advance Farwell & Co. subsequently refunded, direct to Yeager & Co., thus treating it as an advance on their account. See Rec., p. 11.

Upon this state of facts plaintiffs in error make the following points:

1. Plaintiffs in error were merely endorsers, at the request

and for the accommodation of defendants in error, and without consideration, and consequently are not liable to said defendants upon this note.

The declaration charges in the usual form that Yaeger & Co. endorsed and delivered this note for value to Defendants in error.

This is an essential allegation and must be proved, either directly or by the proof of certain facts, from which, the law will imply the facts alleged. The production of the note, endorsed by the payee, who was Kerkhoff, the maker, and with the subsequent endorsement of Yaeger & Co., would furnish *prima facie* evidence of the facts alleged in the declaration.

But the evidence in the record rebuts this prima facie case, and establishes, as we contend, the facts upon which our first point is made. From this evidence it appears, beyond dispute, that the loan to Kerkhoff was made on the security of Kerkhoff's note and deed of trust.

Farwell & Co., by their letter of September 25, 1866, agree to loan Obermeyer & Co. $15,000 upon certain terms, on the security of the land. See Rec. p. 7. No intimation is given that an endorser will be demanded or desired. The terms are accepted by the other party; the papers are made out. The deed of trust is put upon record, thereby fixing the lien upon the property of C. H. Kirkhoff, and the deed and notes are then sent to Farwell. See letters of Plaintiffs and Defendants, Rec. p. 8. In Defendants' letter of Nov. 30, 1866, they say: "We observe that the notes are made at the rate of 10 per cent. interest per annum," showing that they had received the notes prior to that date. No endorsement of Yaeger & Co. was on them at that date. Kirkhoff never asked Yaeger & Co. to endorse them. It was no part of the agreement between Farwell & Co. and Obermeyer & Co. that Yaeger & Co. should endorse them. They were executed and delivered and accepted without such endorsement. Allusion is made to their drawing 10 instead of 12 per cent. interest, but that is explained satisfactorily by Yaeger & Co. when they returned the notes and deeds of trust to Farwell & Co., after the initial of Farwell's middle name had been inserted. See letter

of Yaeger & Co of Dec. 10, 1866, Rec. p. 11. But the notes were sent to Yaeger & Co. by Farwell & Co. with this request, accompanied by a specific pledge or assurance: "*We will thank your Mr. Yeager to endorse the notes in the name of your firm, or his individual name*, as may be preferred. THIS WILL DO HIM NO HARM, *and will be an accommodation to us.*" See Farwell's letter of Nov. 30, 1866, Rec. p. 8.

Yaeger & Co. complied with this request, and indorsed the notes. It was solely at the request and for the accommodation of Farwell that this indorsement was made. Yaeger testifies that it was after this letter of Farwell & Co. that he indorsed the notes; that he never received a cent from either of the parties, for anything he did in this matter.—[Record, p. 9.

While it will be admitted that, so far as third parties would be concerned, Yaeger & Co. would be liable on this indorsement, if the paper was taken for value, and without notice, upon what principle of law can Farwell & Co. recover of Yaeger & Co.?

It has been repeatedly held that the maker of a promissory note, executed without consideration, and at the request and for the accommodation of the payee, was not liable to a recovery at the suit of such payee.

Does not the same rule hold good with reference to an indorser, who has indorsed the note without consideration, and at the request and for the accommodation of the payee, or of a prior indorser?

The Court refused to charge the jury, or to lay down the law, to this effect, [Rec. p. 11,] and did charge "that, if Yaeger & Co. placed their names on the back of the note in question, before the negotiation for the loan by the plaintiffs was closed, or before the plaintiffs advanced any money on said loan, then the defendants are liable as indorsers."

In refusing to charge as requested by plaintiffs in error, and in giving the above charge the Court committed error. The evidence is uncontradicted, that the endorsement was after defendants in error had agreed to make the loan, without any endorsement, and after the deed and notes had been executed and delivered to Farwell & Co. See Farwell's letter of Nov.

30, 1866, Rec. p. 8., also Yaeger's testimony, Rec. p. 10.

The deed was returned only to have a clerical error corrected. The notes never were returned to the maker. They were sent to Yaeger & Co. with a very polite request of Farwell & Co. that Yaeger & Co. would endorse them, upon the assurance of Farwell & Co. that "*this will do him no harm, and will be an accommodation to us.*"

The fact that the money was advanced after Yaeger & Co.'s endorsement could not make them liable, because the endorsement was not made at the instance of the maker of the note, nor for the security of Farwell & Co., but at their request, for their accommodation, without consideration, and upon the pledge of Farwell & Co. that they should not be damnified thereby. The whole instruction was erroneous.

2. Our second proposition is, that if Yaeger & Co. had been endorsers for value, or if the note had been in the hands of third parties, they were discharged by the failure to make demand of payment on the day of the maturity of the note, and to notify Yaeger & Co. of the demand and refusal of payment. This was never done. No attempt to prove such demand or notice was made. But in lieu of it plaintiff below introduced the letter of Yaeger & Co., before referred to, written at St. Louis the very day the note was payable at Boston, more than a thousand miles distant, in which they speak of Kerkhoff's inability to place funds in Boston to meet his note on that day, and of his assurance that it shall be done in a week or ten days. They then add: "But we hold ourselves responsible for the payment of this note, and shall see that it is done at an early day." The court charged the jury that this was a "waiver of protest," &c. (See charge on page 13 of Record.")

There is certainly no direct waiver of *demand*, protest, &c., in this letter, for not a word is said about a protest, nor is it a waiver of demand or notice.

But it will be observed that the letter was written at St. Louis on the day the note was payable in Boston, and could not have reached Farwell & Co. until several days after defendants below had been discharged by a failure to make demand and give notice.

In reference to a waiver, it is held that it must be made before the maturity of the paper, and in consequence of the waiver the holder of the note must omit to make demand and give notice; or, if made after the dishonor of the paper, it must be with full notice of the fact that no demand was made.

There was nothing of the kind here. The holders of the note were not induced to omit the demand and notice by this letter or promise of Yaeger & Co., for they could not by any possibility have known anything about this letter until Yaeger & Co. had been fully discharged by their neglect, Nor can the promise or statement of Yaeger & Co. bind them as a promise made after a failure to protest or give notice, for such promise to be binding must be made after the endorser has knowledge of the fact that he has been discharged by the failure to made demand and give the notice. In this case there could be and was nothing of the kind.

If the promise was made before the time for the demand on the 18th October, '67, had passed, it was wholly without consideration and void; it only stated what would have been the legal liability of Yaeger & Co. without such promise (assuming that they were endorsers for value). If it was made afterwards, it was *nudum pactum*, without consideration and void; and it was error in the Court to refuse so to charge, and to charge that there was a waiver.

Counsel also submit that the Court erred in its remarks to the jury, after they had announced that they could not agree. [See Rec., pp. 12, 13.] The Court there not only lays down the law, but also declares what the facts are, and, as counsel thinks, construes Yaeger & Co.'s letter erroneously. The Court treats the advances by Yaeger & Co. to Obermeyer & Co. as a loan from Yaeger & Co. to them. But such does not seem to be the intention of the parties. Yaeger asserts that he made them on the faith and on account of the loan.

They say, "The amount advanced to Messrs. Obermeyer & Co. by us from time to time is $4,329 70, for this we made draft on you to-day at thirty days, so please do not charge this to our account." See letter of Dec. 10, 1866, Rec. p. 11.

They do not look to Obermeyer for it, but treat Farwell &

Co. as the party who are to pay it, and Farwell & Co. take the same view of the matter, for they refund the money to Yaeger & Co. and charge it to Obermeyer & Co. as part of the loan. If this view is correct, then a considerable part of the money was actually paid over to Obermeyer & Co. before the endorsement of Yaeger & Co.

1. In support of the first proposition counsel beg leave to refer to the following authorities:

Moore vs. Maddock, 33 Mo. 575.
Dowe vs. Schutt, 2. Denio, p. 624.
Corlies vs. Howe, 11 Gray, p. 127.
Slade vs. Hood, 13 Gray 99.
Parish vs. Stone, 14 Pick. 201.
Schoonmaker vs. Roosa, 17 J. R. 304.
Parsons' Mer. Law, 97.

The following authorities support the second proposition:

Freeman vs. Boynton, 7 Mass., 488.
Garland vs. Salem Bank, 9 Mass., 394.
Lowe vs. Howard, 11 Cush., 268.
Kelly vs. Brown, 5 Gray, 108.
Cayuga Bank vs. Dill, 5 Hill, 404.

In Dow *vs.* Schutt, 2 Den. 624, the Court say; "The legal attributes of accommodation paper are not changed by a promise, performed or unperformed, to give security for its payment by the person for whose benefit it was made. It is still but accommodation paper. *The person for whom it was made cannot eollect it.* * * * These principles are too plain to require a reference to authority for their support."

Counsel for Plaintiffs in error submits that the charges of the Circuit Court for Missouri were in direct conflict with these authorities and with the established legal principles which they support.

Wherefore they pray that the judgment of the Circuit Court may be reversed, and the cause remanded, or judgment for plaintiffs in error entered here.

GEO. P. STRONG,
Attorney for Plaintiffs in Error.
With SLAYBACK & HAEUSSLER.

Mr. Justice Clifford

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IN THE SUPREME COURT

OF THE UNITED STATES.

HENRY C. YEAGER & CO.,

Plaintiffs in Error.

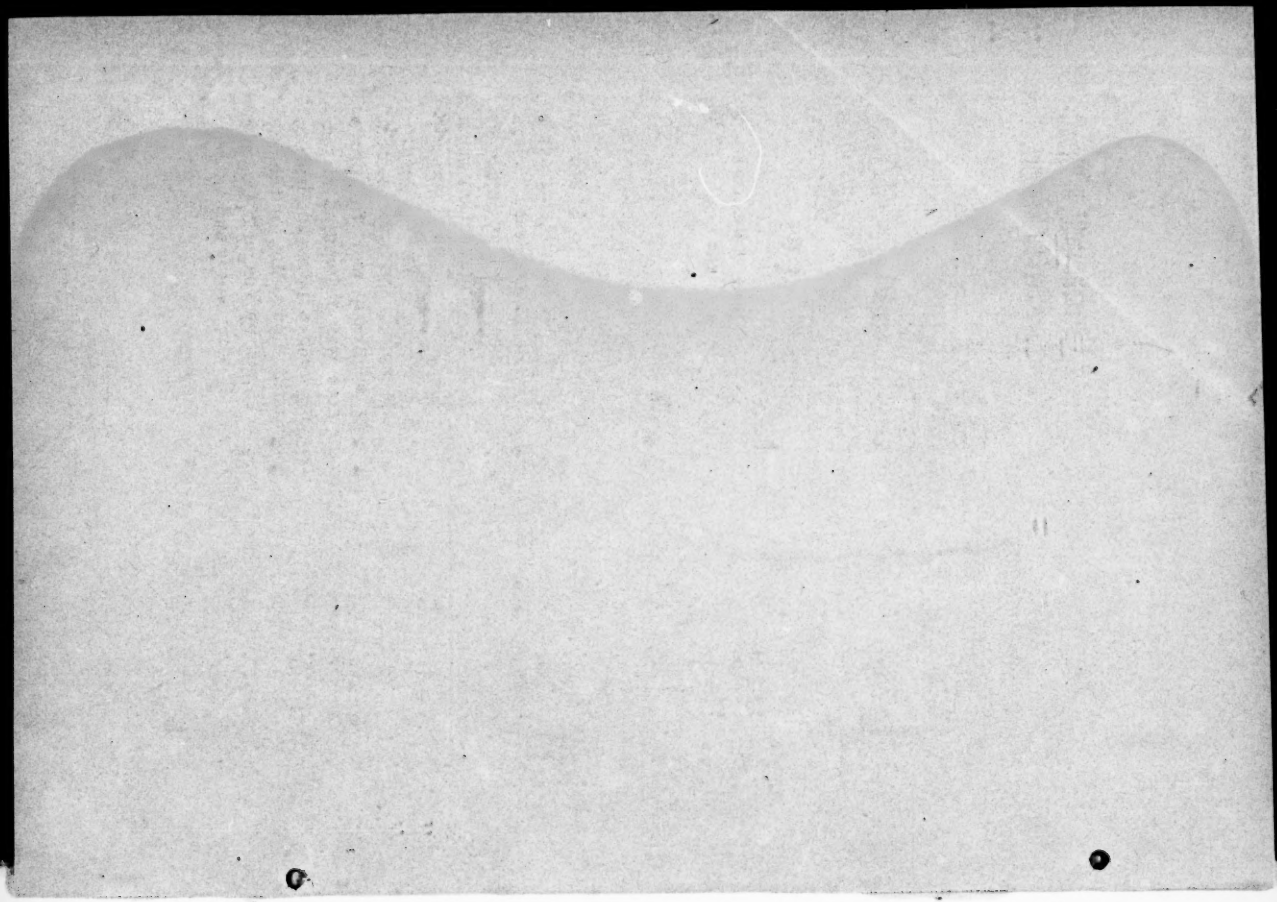
VERSUS

A. G. FARWELL & CO.,

Defendants in Error.

ARGUMENT OF THOS. T. GANTT,

for Defendants in Error.



YEAGER & CO.,

Plaintiffs in error,

vs.

A. G. FARWELL & CO.,

Defendants in error.

} Error to the U. S. Circuit Court for Missouri.

Farwell & Co. sued Yeager & Co. in assumpsit as endorsers of a negotiable promissory note, dated at St. Louis, Mo., on 15th Oct. 1866, payable one year after date at the office of A. G. Farwell & Co., Boston, Mass. The declaration stated, that the note was for $15,750 and ten per cent. interest, was made by C. H. Kerkhoff, payable to his own order, and was endorsed by Kerkhoff and Yeager & Co.; that when the note became due on the 18th October, 1867, it was presented at the place named for payment, which was refused, and Yeager & Co. had due notice, and on the 18th October, 1867, expressly promised to pay the same to the plaintiffs Farwell & Co.; that credits were given, which reduced the amount due on 24th February, 1870, to $4,940 44, and for this balance Farwell & Co., plaintiffs, asked judgment. The defendants, Yeager & Co., pleaded the general issue. There was a verdict on 29th April, 1870, for the balance due, $5,020.64 and ten per cent. interest. Defendants, Yeager & Co., sued out a writ of error to reverse this judgment; and it appears by the bill of exeptions, that the plaintiffs, Farwell & Co., produced and read at the trial the note, the endorsement of which by Yeager & Co. was admitted, and to prove that Yeager & Co. knew that the note was dishonored at maturity and promised to pay the same, read a letter admitted to have been written by them, dated at St. Louis, Mo., on the day when the note matured at Boston, signed by Yeager & Co., and addressed to Farwell & Co. in the following words and figures :

St. Louis, Oct. 18th, 1867.

Messrs. A. G. Farwell & Co., Boston.

Gentlemen: Mr. Kerkhoff fully expected to be able to place funds in our hands, in time for us to have them with you to-day to meet his note for $15,000, but owing to the stringency of money market, he has been unable thus far to complete arrangements to raise the money so as to have it in your hands to-day; but in a week or ten days it will be forthcoming, and he assures us it will be done without fail, and feels very sorry that circumstances were such as to prevent his meeting the note at maturity. We also feel very much annoyed about it, but we have the comforting assurance in our hearts, that you can readily understand the difficulty there is in raising so large an amount here in the West at least where money is so scarce, and so much required to move the crops. But we hold ourselves responsible for the payment of this note, and shall see that it is done at an early day. Thanking you for your many acts of kindness to us, we are yours truly,

Yeager & Co.

And here plaintiffs rested.

Crangle, one of the defendants, testified that C. H. Kerkhoff and Obermeyer & Co. meant the same firm—that Yeager & Co. did the bulk of the business of Obermeyer & Co.,—could not say that they did all of it,—that all of the flour of Obermeyer & Co. that came to the hands of Yeager & Co. for shipment, was sent to Farwell & Co., who were Commission merchants at Boston, Massachusetts. — Yeager & Co. being Commission merchants at St. Louis, Mo., and having been for years in active business correspondence with Farwell & Co. Evidence was then given, tending to show that in 1866 Obermeyer & Co. who had just finished a large flouring mill, wanted money to carry on their business, and offered as security for $15,000.00 a tract of 500 acres 40 miles from St. Louis; that Yeager & Co. submitted to Farwell & Co. the proposal of Obermeyer & Co. for the loan, and urged as a reason for their making it, that they (Farwell & Co.) would receive a large share of the product of the new mill. Yeager & Co. recommended the loan to Farwell & Co. and certified to the sufficiency of the security. On 19th September, 1866, Yeager & Co. wrote in reply to a letter from Farwell & Co., that the tract of 500 acres was worth

$25,000.00, urging Farwell & Co. to make the loan for one year, after which they, Yeager & Co., would make it themselves, and begging Farwell & Co. to consider the matter carefully. In reply Farwell & Co. on the 25th September, 1866, wrote Yeager & Co., that they relied for the security on them (Yeager & Co.) and that they wished it to be good and certain beyond question, and that on their assurance, that it was so, they would take the loan for one year; that Farwell & Co. didn't want to lend them money at all, but did it at the request of Yeager & Co.— On the 15th October, 1866, the note described in the declaration and read in evidence, together with a deed of trust of the farm, wherein Henry C. Yeager was made trustee, were executed by Kerkhoff. On the 24th October, 1866, Yaeger & Co. wrote to Farwell & Co. that the deed was being recorded, that Kerkhoff would want the money in a week or ten days; that then Yeager & Co. had advanced him $3,000.00 and that he would require more on Saturday. On 27th November, 1866, Yeager & Co. wrote again, sending the Deed of Trust and note, and telling Farwell & Co., that they (Yeager & Co.) had advanced nearly $4,000.00 to Obermeyer & Co. already. To this Farwell & Co. answered on 30th November, 1866, acknowledging receipt of deed and note, but returning the note to be indorsed by Yeager & Co. or Henry C. Yeager, as might be preferred.—This indorsement was made in the name of the firm, and the note returned to Farwell & Co. All these facts appeared by the correspondence between Farwell & Co. and Yeager & Co.

Henry C. Yeager was then placed on the stand, and the defendants asked the following question: "State the consideration and the circumstances under which the indorsement of the firm named Yeager & Co. was placed upon the note in controversy", to which Farwell & Co. objected on the ground that the whole of the negotiations had been conducted by written correspondence between the parties, which had already been read. The Court sustained the objection and excluded the question, Yeager & Co. excepting. Yeager then stated, in answer to a question, that the indorsement was not made until after 30th November, 1866. The following question was then put to Yeager & Co:

"What consideration, if any, was the basis of your letter

of Oct. 18, 1867? This question was objected to by Farwell & Co. on the ground, that the negotiations were in writing and that they did not seek to hold Yeager & Co liable as guarantors, but as endorsers. The Court excluded the question, and Yeager & Co. excepted.

Yeager proceeded to testify, that after the loan Obermeyer & Co. shipped to Farwell & Co. directly the bulk of their flour and that Yeager & Co. shipped none of it: That neither Yeager & Co. nor Yeager had received a cent for negotiating the loan. That as Trustee he had sold the property conveyed by the Deed of Trust and the net proceeds were credited on the note. That "owing to the decline in the value of the property, it had sold below its worth."—On Cross-examination he stated, that he always considered the property ample security for the amount of $15,000.00, and that he believed it to be worth more money to-day. That he had no interest in the firm of Obermeyer & Co.—Farwell & Co. than proved by witness two letters written by Yeager & Co. to Farwell & Co., one dated 11th September, 1867, asking Farwell & Co. to return the deeds of trust sent them the previous year, and the other dated 16th September, 1867, asking for a renewal of the note of Kerkhoff for another year. To these Farwell & Co. replied on the 19th and 20th September, 1867, returning the deed of trust by the first, and declining the renewal by the second letter. The witness then added, that Yeager & Co. advanced no money to Obermeyer & Co. until Farwell & Co. agreed to make the loan. Part of it was advanced before the note was endorsed by Yeager & Co.

Farwell & Co. in rebuttal put in evidence a letter of Yeager & Co., dated December 10th, 1866, to be found at p. 11 of the printed record. By this Letter Yeager & Co. purported to remit the deed of trust and notes of Kerkhoff, and stated that the amount by Yeager & Co. advanced up to that time to Obermeyer & Co. was $4,329.80, for which Yeager & Co. that day drew on Farwell & Co. at 30 days sight. Yeager & Co. objected to this letter on the ground, that the same was not competent. The Court overruled the objection, Yeager & Co. excepting. Plaintiffs (Farwell & Co.) then proved that they had paid this draft for $4,329.70: that on the 10th December, 1866, they advanced to Obermeyer & Co. $2,000.00, on January 2nd, 1867,

$6,000.00, and on 23rd January, 1867, $2,330.29, all of which advances were made to Obermeyer & Co. on drafts forwarded to the plaintiffs Farwell & Co. by defendants Yeager & Co. This was all the evidence in the cause.

The defendants Yeager & Co. then asked the Court to instruct the Jurors as follows:

The Jury are instructed, that even if they believe defendants were endorsers on the note in question, still they are not liable thereon, unless the same was presented for payment at the time of its maturity and at the place where it was made payable and payment thereof demanded and was afterwards duly protested for non-payment and notice of such demand, refusal and protest given to the defendants, and unless they believe these acts were done, they should find for the defendants, unless they further find from the evidence that defendants promised to pay the note in question after its maturity, and after they knew that the same had not been duly presented, payment demanded and protested.

If the Jury believe from the evidence that defendants endorsed the note in question at the request and for the accommodation of plaintiffs and without any consideration, either from the maker of said note or the plaintiffs, then they will find for the defendants.

The Jury are instructed that the plaintiffs, in order to relieve themselves from the necessity of giving notice to the defendants of the non-payment of the note sued on, must show a waiver of the right on the part of Yeager & Co., either expressed or implied to demand such notice or a promise to pay such note after its dishonor with a knowlege of the facts of its presentment for payment and dishonor or failure of plaintiffs to present said note for payment.

The Court instructs the Jury, that a mere moral or conscientious obligation on part of defendants to be responsible for the payment of the note in question, unconnected with any prior legal or equitable claim or demand held by plaintiffs against defendants, and given or made without any consideration, is not enough to support a promise to pay and make liable as endorsers on the note sued on.

In order to hold defendants liable as guarantors of the note sued upon, the plaintiffs must show, that they notified defen-

dants, that their guaranty was accepted by the plaintiffs, and defendants are not liable upon such guaranty unless such notice has been shown.

Which instructions were all asked as a whole and refused as a whole. The defendants Yeager & Co. excepted to the refusal.

The Court then charged the Jury as follows:

The Jury are instructed, that if Yeager & Co. placed their names on the back of the note in question before the negotiation for the loan by the plaintiffs was closed or before the plaintiffs advanced any money on said loan, then the defendants are liable as indorsers. And to this instruction the defendants, Yeager & Co., excepted at the time on the ground, that it did not submit to the Jury the question of manner of notice, demand and protest, or the question of consideration.

The Jury thereupon retired and presently returned a verdict for the plaintiffs. Being polled, two of them, Leonard Henry and James S. Finly, said it was not their verdict. The Court inquired of Leonard Henry, "why is it not your verdict?" and he replied, "because I believe plaintiffs had advanced money on that loan before the note was indorsed by defendants." Finley made the same answer to the same question. The Court thereupon told the Jury to retire and consider further of their verdict, and if the dissenting Jurors wished to call for any part of the testimony in the case, they could do so, and take any of the letters read to their room. Yeager & Co. excepted to this remark of the Court at the time. Thereupon the Counsel for plaintiffs suggested, that the letter of defendaats to plaintiffs of December 10th, 1866, contained the desired testimony, and the Court called for that letter and read it to the Jury and commented on the same; and to this action the defendants, Yeager & Co., excepted. The Court's comment was as follows: "This letter says, "the amount advanced to Messrs. Obermeyer & Co. by us from time to time is $4,329.70." It does not say by Farwell & Co., but "by us," the witness Yeager & Co.: and it is not advances made by Yeager & Co. previous to the indorsement, which you are specially to consider, for in such case this loan might have been only brought about by Yeager & Co. that they might get back what they had themselves advanced

to Obermeyer & Co.: but you must find, that advances were made by Farwell & Co. previous to the time Yeager & Co. indorsed the note, or you will find for the plaintiffs. The real question is: whether plaintiffs concluded the negotiation for the loan and took the note and deed of trust in question as their security without the indorsement of the defendants, or whether they withheld all advances until defendants became indorsers. You can now take the letter with you to your room and study it over for yourselves, and consider further, if you can agree on a verdict. I say again, if the advances were not made by Farwell & Co. before the indorsement, then defendants are liable as indorsers, there having been a waiver by them of protest."

Thereupon Yeager & Co. asked the Court to submit to the Jury the hypothesis, "whether the advances were made by Yeager & Co. as agents for Farwell & Co." The Court remarked that the Jury could judge if any testimony to that effect had been given—that the Court had heard nothing of the sort, but left it to the Jury. And to this ruling the defendants, Yeager & Co., excepted at the time.

Thereupon Yeager & Co. by their Counsel asked that the other letters read at the trial might be given to the Jury. The Court said it was unnecessary unless the Jury required them, in which event they might take them. To this ruling Yeager & Co. excepted.

The verdict being rendered, as shown at page 4 of printed record, and judgment being thereupon given, Yeager & Co. filed their bill of exceptions and sued out this writ of error.

Upon the foregoing statement, which is a full one, Farwell & Co., defendants in error, submit that there is no trace of error in the record. The facts of the case are few and *very* unequivocal. Yeager & Co. were Commission Merchants in St. Louis. Farwell & Co. were Commission Merchants in Boston. Yeager & Co. applied in September, 1866, to Farwell & Co. to lend $15,000.00 to their friends Obermeyer & Co. (or Kerkhoff). Farwell & Co. did not wish to do this, but Yeager & Co. were very urgent with them to make the loan, and assured Farwell & Co. that the security was ample, and begged Farwell & Co. to make the loan for one year, saying that they (Yeager & Co.) will continue it after that time. (See page 7 of printed record,

letter of Yeager & Co., 19th September, 1866). Yielding to this entreaty, Farwell & Co. agreed to make the loan, saying to Yeager & Co., that they "want to feel, *first and foremost*, that the land is *good and ample security beyond a question: and for that certainty we rely on you*—that being so, we will loan the money for one year." The deed of trust and notes were then prepared, Yeager & Co. conducting all the correspondence on the part of Kerkhoff, or Obermeyer & Co. They were finally sent forward to Farwell & Co. on 27th November, 1866, by Yeager & Co., who mention, that *they* have advanced nearly $5,000.00 to Obermeyer & Co. and are somewhat anxious to get it back. The note for $15,750 was drawn by Kerkhoff to his own order and by him endorsed—and thus it was sent to Farwell & Co. They promptly returned it for the endorsement of either Henry Yeager or Yeager & Co., and up to this time they did not advance a penny.—It was endorsed by Yeager & Co. and returned to Farwell & Co. on the 10th December, 1866, and at the same time Yeager & Co. got from Farwell & Co. the first advance to Obermeyer & Co. in the shape of payment of $4,329.70, advances by Yeager & Co. theretofore made to Obermeyer & Co. The further sum of $10,330.29 was paid by Farwell & Co. in all the months of December, 1866, and January, 1867; the agreements were, that Obermeyer & Co. should draw as they needed and be charged interest for what they got, the note and deed standing as security for what was advanced. On 16th September, 1867, Yeager & Co. applied to Farwell & Co. for a renewal of this note, and on the 20th September Farwell & Co. replied, that they could not renew. The note was due on 15–18 October, 1867. On the last of these days Yeager & Co. wrote to Farwell & Co., expressing their disappointment at Kerkhoff not being able to meet his note on that day, but assured them that it will be forthcoming in a week or ten days, adding that they, Yeager & Co., were very much annoyed about it.. **"But we hold ourselves responsible for the payment of the note, and shall see, that it is done at an early day."**

This promise not being kept, after exhausting the specific security, (which left due an undisputed balance of $4,940.44 as of 24th February, 1870) this suit was brought against Yeager & Co., and all these facts appeared at the trial.

The defendants made in substance two points. The first was, that inasmuch as Farwell & Co. could not receive in Boston until after the 18th October, 1867, the letter written in St. Louis on that day; that letter did not prevent and could not have prevented the making of the demand of payment at Boston on that day, and the giving of notice of dishonor to Yeager & Co: and **therefore** that letter could not be treated as a waiver of protest nor as a promise to pay the note.

Secondly, the Counsel for Yeager & Co. insisted, (notwithstanding the disclaimer and the estoppel of record by the plaintiffs Farwell & Co.,) that the suit was against Yeager & Co. as *guarantors*, not as indorsers; and that there was no consideration for the guaranty.

It is unnecessary to be prolix on either point. In respect of the first it is sufficient to remember the familiar law, that indorsers of bills of exchange and negotiable promissory notes are entitled to notice of the dishonor of the paper which they, contingently not absolutely, promise to pay. The promise of an indorser of a negotiable note is to pay it in case of its being unpaid by the acceptor or maker, and notice of dishonor being given at once to the indorser. Sometimes the relations of an indorser to the maker or acceptor are such as to make notice needless—as for example, when the makers are a firm, of which one of the indorsers is a member. Again, where an indorser receives security for his indorsement, he is not entitled to notice; and where an indorser of a promissory note, before it fell due, informed the holder that the maker had absconded, and that he had been secured and would give a new note, it was held that no notice was necessarry. "The "defendant was fully apprised of his situation before and at the "time when the note became due; one of the makers was ab- "sent from the State, the other had absconded. A formal de- "mand and notice under such circumstances could answer no "valuable purpose. The defendant, sensible of this, by his own "acts admitted his responsibility, treated the note as his own "and negotiated for further time of payment. By this conduct "he waived the necessity of any demand or notice" (Leffingwell and Pierrepont vs. White, I. Johns. Cases, 101.—Kent, Lansing, Yates, Judges).

But in the case at bar we have no need to invoke this law, undoubted as it is, for on the last day of grace, after Yeager & Co. *knew*, and solemnly *recited* that the maker was not able to pay, and had not paid, they expressed their own sorrow at his failure, assured Farwell & Co. that all would be right in a week or ten days, and add, *"but we hold ourselves responsible for the payment of the note, and shall see it is done at an early day."* Here is a plain, distinct promise to pay the note, with full knowledge that it had been dishonored. The case of Sigerson vs. Mathews, 20 How., p. 496, was much stronger than this, and is indeed so strong as to render further citation needless, even if the point were an obscure one, which it by no means is.

The question presented might have been interesting, if Yeager & Co. had stopped short of the express and direct promise with which their letter closes. Suppose the last three lines of their letter of 18th October, 1867, had been omitted, would Farwell & Co. have been justified in giving them *notice* of the facts stated in that letter? Would demand and notice under such circumstances answer any more "valuable purpose" than the Court of New York (1. Johns Case, *ubi supra*) commented upon? We think not. *Lex neminem cogit ad vana.* We think that if this promise had been altogether wanting, the recital by Yeager & Co. under their hand of every fact of which the fullest and most circumstantial notice could inform them, on the last of the days of grace on which the note was entitled, would leave dispensed with any necessity to give them information of what they showed that they knew perfectly well.

The Statutes of most of the States require in respect of the acknowledgment of deeds by married woman, when the deed does not become operative as to them until acknowledged, that the officer making the examination of the woman and taking her acknowledgment should "acquaint such woman with the contents of the deed or conveyance &c."—Accordingly in a case, where the certificate set forth that the woman "acknowledged and declared, that she was well acquainted with the contents of the deed" (Thomas vs. Meier, 11 Mo. 573) the deed was impeached, as vitiated by the failure of the officer to give the information which the woman declared that she

had already. The Supreme Court of Missouri, following a hundred similar decisions, declared that no objection on this ground was tenable (p. 578). Yet surely here, if anywhere, might some greater exactness have been allowable. If indeed the woman had *recited* the contents of the deed, nothing more could have been demanded by a reasonable being. But it is at least conceivable, that the woman might be mistaken in supposing that she knew the contents, and ten to one, she got her notions of them from her husband, if she did know them at all. By allowing the officer to take her word for it, instead of testing her knowledge, a door to mischief is certainly left open, a door too which it was the policy of the law to close. But in the case at bar, neither Pyrrho nor Lord Eldon could doubt that Yeager & Co. possessed in the amplest measure all the information which any notice of dishonor could convey to them.

Perhaps the undersigned is to blame in thus considering a point which the record does not present, there being an express and distinct promise to pay after a recital of all the facts of the case; and the letter being the undisputed utterance of the defendants, Yeager & Co., the Court treated it as a substitute for the most ceremonious demand and formal notice of dishonor, and declared to the Jury that such was its legal effect. If there had been any dispute as to the genuineness of the letter, the Jury would have passed upon it. But there was no such question. The record admits that it was written by Yeager & Co. The only point made by Counsel was as to its legal effect. This was correctly declared by the Court, and the undersigned feels that he would be inexcusable if he dwelt further on this topic.

Coming to the next point made by the defendants below, it is to be observed that the Court told the Jury, that if the defendants stood in the position of indorsers, they were bound by their indorsement and the waiver of notice or promise to pay, and that they *were* indorsers, if Farwell & Co. required them to place their names on the note before the negotiation was closed, or before there were any advances on the note; which is so plain that it is difficult to understand how it can be disputed. Indeed, there is in what the Court said a leaning in favor of Yeager & Co. of which Farwell & Co. might well

complain. It by no means follows that if Farwell & Co. had advanced part of this loan before the completion and the delivery of the papers to them, they would be thereby precluded from treating Yeager & Co. as indorsers. — It is believed that it was not at all the intention of the learned Judge, who presided at the trial, to lay down the law so strongly in favor of Yeager & Co. But he *did* so lay it down, or he appears from this record to have so laid it down. *We* of course do not complain, having no mission to that end. But it is submitted, that Yeager & Co. are without any ground of exception, or complaint. They insisted that they were only guarantors—*we* charged them as indorsers, which they undeniably are.—We do indeed think they were guarantors also; but we are dealing with them as indorsers at present. If it had been necessary, we think we could have held them as guarantors, had the letter of 18th October, 1867, been out of the case. Of course, having the choice, we took the shortest road to a judgment. The Court took the view, that if Yeager & Co. had indorsed the paper after any part of the money had been advanced, they would be liable only as guarantors, and that no recovery could be had in that event in this action. This was a very favorable view for the defendants Yeager & Co. But the Jury negatived the fact on which this proposition was founded; and that is an end of the matter.

The defendants, Yeager & Co., asked in one batch five instructions, not one of which is law. It is enough to justify the refusal of them *all*, that one of them was faulty. — The actual fact is, that none of them is free from fault. A very rapid glance at them will be sufficient to discover this truth.

The first of them assumes that a *protest* is necessary in the case of a dishonored negotiable note. Now, by the statute of Ann and the statute of Missouri, a negotiable note is in this particular on the footing not of a *foreign*, but a *domestic* bill of exchange (Rev. Stat. of Mo. Title 86, § 15, p. 396) and a *protest* is required only in the case of a foreign Bill—3 Kent's Comm. (11th Ed.) p. 124–5–6 (Sidepaging 94.)

But this is not all. A letter, admitted to have been written by Yaeger & Co., had been given in evidence and construed by the Court to supersede all necessity for referring

to the questions of demand, refusal and notice. Under these circumstances it was wholly improper to ask any instructions on these heads for the guidance of the Jury. The whole subject was withdrawn from them and decided as matter of *law* by the Court (as was declared to be the proper course in Sice vs. Cunningham, 1. Cow. 397—406.)

The second imported that if the defendants indorsed the note at the request of plaintiffs and for *their accommodation* without consideration &c., the Jury must find for the defendants. This was a most improper declaration of law, and if given would have been certain to mislead. Undoubtedly, defendants did indorse the note on the requirement of Farwell & Co. It was a condition made by them, *sine qua non.* Yeager & Co. had solicited the loan for Obermeyer & Co. from Farwell & Co., and had represented the security to be ample and certain beyond all doubt. Farwell & Co., always disinclined to make the loan at all, had only consented to make it on condition of being made perfectly secure on this head—and had declared that for *this* they relied on Yeager & Co. Farwell & Co. knew nothing of the nature of the security except what they learned from Yeager & Co.—*These* were profuse of assurances as to the unimpeachable nature of it.—When the papers were sent on by the letter of 27th November, 1866, the note was made payable to the order of Kerkhoff and by him indorsed. Farwell & Co. promptly (on the 30th November, '66, by return of post indeed) returned this note for the indorsement of Yeager & Co. or Henry C. Yeager, as might be preferred. Much stress was laid in the Circuit Court on the language then used by Farwell & Co: "*This will do him no harm, and will be an accommodation to us.*" It was urged that this expression implied, that Farwell & Co. desired this indorsement not as something by which Yeager & Co. would be bound to *them,* but as an accommodation by means of which Farwell & Co. would, for a time, enjoy the benefit of the credit due to that indorsement.—Farwell & Co. on the other hand say that the natural meaning of that language was merely this: "You "have declared that *you* know all about this security, and that "it is ample beyond all question. May be so, but we would like "to have your indorsement.—If what you have reiterated over "and over again be true or anything like the truth, it can do *you*

"no harm, but it will make *us* feel much more easy—and you "must indorse this paper, or the whole matter stops here"—This, it is submitted, is the obivious meaning of the language used. But suppose that Farwell & Co. had *asked* or *requested* Yeager & Co. to indorse the paper of Obermeyer & Co. before they (F. & Co.) would discount it—what does this signify? Simply, that Farwell & Co. being requested to advance money on certain paper had requested those from whom the request proceeded to undertake certain responsibilities in respect of the paper. By indorsing it, they made themselves liable to pay it if the maker failed to do so. This was the character of the undertaking they were requested to make, and which they did make. It would have been a monstrous outrage upon the understanding of both parties, if the Court had told the Jury that by asking for this indorsement, Farwell & Co. disabled themselves from making any use of it.

The third instruction is faulty for the same reasons that have been already alluded to in treating of the first. The whole question of demand of payment, dishonor and notice was wholy superceded by the admission contained in the letter of Yeager & Co., dated 18th October, 1867, the genuineness of which was admitted in open Court.

The fourth instruction refused asks the Court to invite the Jury to indulge an hypothesis not only unwarranted by the testimony, but flagrantly at war with it. It entirely ignores the relations existing between the holder and the indorser of negotiable paper. In the case at bar, nothing is clearer than that the indorsement of Yaeger & Co. had been very instrumental in promoting the discount of the paper — nay, that the discounting had proceeded essentially on this indorsement, and would never have had place without it. Then we have it on the certificate of Yeager & Co., that they were fully aware of all the circumstances at the time that the paper was dishonored, but that they held themselves, on the day of the dishonor, bound to make it good. Every particular required to fix their contingent liability was established not by inference from circumstances, but from their own detailed declaration containing a recital of every fact which Farwell & Co. would otherwise have been compellable to prove. It was really hardly respectful to the Court below under

such circumstances to ask it to declare that a promise to do what the establishment of these facts would have fixed on them as an imperious duty, had no consideration to support it.

Little need be said on the subject of the fifth instruction. Yeager & Co. were not sued as guarantors, but as indorsers. If the Court had given this instruction, it would have been guilty of the blunder of inviting the Jury to consider a case not made by the pleadings or the evidence, and to indulge an hypothesis, which, whatever else may be said of it, could not have failed to distract their minds from the issues in this cause, being itself entirely foreign to them all.—It may be said for example that the statue of frauds requires that a guaranty should state the consideration for the promise, and that the decision in the case of Leonard & Vredenburgh 8. Johns 29. does not militate with that of Saunders & Wakefield 4, Barn & Ald 595 and Wain & Warlters 5 East 10.–Let this be conceded for the sake of the argument. Would the Circuit Court for Missouri have been for that reason justified in expatiating to the Jury in this cause on this legal principle? Assuredly not. It would have been fully as improper as to have explained, or to have wasted words in the attempt to explain the distinction between an executory devise and a conditional limitation—or the Copernican and Ptolemaian systems of astronomy.

The charge of the Court to the Jury, when reading to them the letter of Yeager & Co., dated December 10, 1866, embraces the whole subject in dispute. The Jury were told, that if the advances were made, in whole or in part, by Farwell & Co. before Yeager & Co. indorsed the note, they must find for defendants; but that if the indorsement preceded any advance, then Yeager & Co. were liable as indorsers; and that their contingent liability as indorses, if they were liable as indorsers at all, became absolute on the 18. October 1867 by reason of the letter they were admitted to have written on that day. The only question for the Jury was the relative time of the indorsement by Yeager & Co. and the advance by Farwell & Co. But if the Jury found that the indorsement preceded the advance, they must find for the plaintiffs; every other issue being in that event disposed of by the Court as matter of law. (As was ruled by the Court in Sice & Cunningham 1. Cow. 397—406.)

It is submitted that this charge was comprehensive and that it correctly informed the Jury of their duty. The verdict of the Jury having been rendered accordingly and being strictly conformable to right and law, the judgment of the Court below must be affirmed.

If the record had presented questions of law requiring the application of the principles declared in such cases as Commercial Bank vs. Hughes 17 Wend. 94—99; Commercial Bank of Albany vs. Clark 28 Vermont 325; Duvall vs. Farmers Bank 9; Gill vs. Johns 31; Breed vs. Hillhouse 7 Conn. 523; Low vs. Howard 10 Cushing 163; Borrodaile vs. Low 6 Taunt. 93; Lundie vs. Robertson 7 East 231; Gibbon vs. Cagger 2 Campb. 188; Taylor vs. Jones 2 Campb. 105; Donnelly vs. Howie p. 436 of Hayes & Jones Irish exch. rep.—the undersigned would willingly have entered upon that interesting discussion, but as matters stand he feels that an apology is needed for having so much as referred to them.

Respectfully submitted.

THOMAS T. GANTT,
of counsel for Farwell & Co., defendants in error.

No 265

IN THE

SUPREME COURT

OF THE UNITED STATES.

ASA FARWELL, et. al., PLAINTIFFS, (DEFENDANTS IN ERROR.)

vs.

HENRY C. YAEGER, et al., DEFENDANTS, (PLAINTIFFS IN ERROR.)

George P. Strong, Jr.

SLAYBACK & HAEUSSLER,

Attorneys for Defendants.

ASA FARWELL, et. al., PLAINTIFFS, (Defendants in error,)

vs.

HENRY C. YAEGER, et. al., DEFENDANTS, (Plaintiffs in error.)

In the Supreme Court of the United States, in error to the Circuit Court of the United States for the Districts of Missouri.

STATEMENT OF THE CASE.

This action in assumpsit is brought to hold the defendants liable as indorsers of a promissory note for $15.750, payable one year after date, executed at St. Louis, Mo., October 15th, 1866. by one C. H. Kerkhoff, to his own order, indorsed by him, delivered to plaintiffs, and subsequently, in the month of December following, endorsed by defendants for the accommodation of plaintiffs, at the plaintiffs' own request, and wholly without consideration.

The first count in the declaration charges that the defendants endorsed and delivered the note for value to plaintiffs.

There is a second count in the declaration, which charges defendants as guarantors. This was expressly abandoned in open court at the trial, and recovery was sought against defendants as indorsers only. Hence, if defendants are not bound as indorsers, plaintiffs, cannot recover.

The facts are as follows: The Plaintiffs, (Defendants in error,) who are Merchants and Capitalists of Boston, had prior to this transaction, traded and corresponded for many years with Defendants, (Plaintiffs in error,) who are dealers in Flour at St. Louis.

In the year A. D. 1866, a firm of millers at St. Louis, styled Obermeyer & Co.—whereof C. H. Kerkhoff was the company—needed money to carry on the operations of a large new mill near St. Louis, and sought to borrow $15.000, by giving 500 acres of land as security for the loan; Defendants, who were friends of Kerkhoff, in writing to plaintiffs about other matters as usual, mentioned this fact, and suggested that plaintiffs should make this loan to Kerkhoff, for the reason that by so doing, plaintiffs could thus get good interest on their money, and also receive a double advantage in being made consignees of the flour to be produced at the new mills of Obermeyer & Kerkhoff, the latter having offered to make arrangement with any Eastern house who would make the desired advance upon that security. No other security was either mentioned or asked. Farwell & Co. agreed to make the loan upon that basis, *provided*, in the judgment of Yeager & Co. the 500

acres of land was good and ample security beyond a question for the amount. The interest was to be the extraordinary rate of one per cent. a month; the time, one year. The money to be advanced as needed in installments. The excess of interest above the legal rate of ten per cent. was to be paid down, or deducted from the first advances, and one half of the regular ten per cent. also. The other one-half of the lawful interest was included in the note $15.750 secured by the deed of trust.

Henry Farwell was made the *cestui que trust*, and at plaintiffs' request, defendant, Henry C. Yaeger, was made plaintiffs' Trustee. The averments in the declaration concerning the deed of trust, are contradicted by the evidence. Yaeger merely acted as the friend of both parties. He received no remuneration for negotiating between them, or for acting as trustee.

On the 25th day of September, 1866, plaintiffs agreed to make the loan to Kerkhoff. On the 15th of October, 1866, Kerkhoff executed the note sued upon, and with it the deed of trust above mentioned.

The deed of trust having been recorded, these papers were transmitted November 27th, 1866, to the plaintiffs through defendants acting as agents for plaintiffs, and at the same time plaintiffs were notified by Yaeger & Co. that these correspondents had *after the acceptance of the loan, and prior* to the date of that mailing, advanced $4,000 (nearly) to Obermeyer & Co. for plaintiffs, as a part of said loan.

This action of Yaeger & Co., in plaintiffs' behalf, was ratified by them November 30th, 1866, when plaintiffs wrote to defendants acknowledging receipt of the note and deed of trust, and requesting the indorsement now under discussion, not as a condition of making the loan to Obermeyer & Co, and not as additional security, but in the following words:

* * "We will thank your Mr. Yaeger to endorse the notes in name of "your firm, or his individual name as may be preferred. *This will do him "no harm, and will be an accommodation to us.*" (See page 8 of the printed record.)

On the strength of this assurance simply and solely as an accommodation to their old friends and correspondents, without any value or consideration, and in compliance with plaintiffs' invitation and request, *after* the note indorsed had actually passed into plaintiffs' possession, defendants endorsed the note in their firm's name, not for value as the declaration avers, but for accommodation and at plaintiffs' own request.

The note was payable at the house of plaintiffs at Boston. It was not protested at its maturity. No notice was ever given to defendants of any presentment and demand, and failure of payment. No notice was given to them as indorsers that they would be looked to for payment.

A long time afterwards, at plaintiffs' request, the defendant Yaeger proceeded to execute his duties as trustee, sold the 500 acres of land at public auction on the 24th day of February, A. D. 1870, and paid over the sum of $10,809,56, which plaintiffs received and credited on said note. As this was less however than the debt of Obermeyer & Co. to plaintiffs, Yaeger deducted

nothing for his services as trustee. Shortly afterwards, to his amazement, he finds himself sued as indorser of the note, this being his first intimation that plaintiffs would look to him for the deficiency of $4 940, $\frac{44}{100}$ remaining unpaid, after exhausting Obermeyer & Co.'s deed of trust.

At the trial plaintiffs claimed that they were absolved from the consequences of neglecting to protest the note at its maturity, or give notice to Yaeger & Co., as indorsers, because after they had allowed the day to go by (October 18, 1867), they received a letter from defendants (see page 6 of the printed record), indicating that Yaeger & Co. knew that Obermeyer & Co. would be unable to pay the note that day. This letter was taken by the Court at the trial as a waiver of protest, and he so charged the jury, refusing to permit the jury to find the fact as to whether there had been a waiver of protest or not, and overlooking the fact that there is a vast difference between Yaeger & Co. having knowledge that Obermeyer & Co. would be unable to meet the paper at its maturity, and their having notice that Farwell & Co. would look to Yaeger & Co. as indorsers. Had such notice been given Yaeger & Co. could subsequently have saved themselves from liability, but plaintiffs waited from October 18, 1867, when the note matured, until February 24, 1870, when the five hundred acres of land having declined in value (see page 9 printed record, near bottom), and being forced to sale under the deed of trust, plaintiffs at the April Term, 1870, of the United States Circuit Court, Districts of Missouri, gave defendants their first notice in the form of a summons. There was no evidence of any presentment or demand of payment of the note at its maturity on October 18, 1867, and the letter written by defendants on that same day at St. Louis was no waiver of the notice required by the law in such cases, for it could not have reached Boston until after the same day. But the jury improperly construed that letter as a promise to pay on the part of defendants, and the Court failed to instruct them as to their duty in this respect. This, in connection with the averment in the declaration of a promise and guaranty of payment by defendants, had great impression on the mind of the jury, although the plaintiffs expressly renounced and disclaimed at the trial in open court any claim to a recovery on the ground that the defendants were guarantors, but claimed a recovery solely on the ground that they were indorsers, and upon no other; and in consequence of which disclaimer and abandonment of such claim, the Court excluded testimony material for defendants (page 9 of printed record) upon that point. Plaintiffs claimed that they did not rely on that letter as evidence of a promise to pay, but to show that defendants had made a waiver of plaintiffs' failure to protest the note at maturity. As the letter in question was written prior to any knowledge on the part of defendants that plaintiffs had failed to have the note protested and dishonored, and due notice thereof given to the defendants as indorsers, the jury were manifestly misled, and the charge of the Court was erroneous in assuming as a matter of law what was really as much a question of fact as any other before the jury. And the charge was erroneous as matter of law; for to be binding as a *waiver* of protest the promise to pay must be after the indorsers have knowledge that

the holder has failed to protest, which is not the case made in this record, and is not the case at bar, in point of fact.

Plaintiffs could not have known that defendants had written such a letter until after the plaintiffs had already released all claim against defendants as indorsers by omitting to protest the note at maturity, and by neglecting to give immediate notice to defendants that they would be looked to for payment. It is erroneous to say that by reason of the letter in question defendants again became liable as indorsers after such release. Yet this is substantially the ruling of the Court.

It will be seen by the record (printed record, page 12, transcript 19) that in his charge the Court assumed that defendants were liable as indorsers, without regard to protest, or notice of presentment, demand and non-payment, and when the jury came in, and two of them denounced the verdict as not theirs, the Judge—Hon. Samuel Treat being the only Judge present at the trial—in trying to persuade these two jurors to give up their real verdict, which was for defendants, entered into a discussion with them to induce them to give up their opinion and adopt his own, and besides, allowing them to take with them a letter which had been used in evidence to prove an isolated fact, thus diverting their minds from the general issue, the Court delivered a second charge, emphasising words in said letter that were not italicised in the original, and giving a construction to it so tortuous that the counsel on plaintiffs' side could have been properly checked up for so using an argument which there was not one iota of testimony to support.

His Honor Judge Treat said: "The real question is whether plaintiffs concluded the negotiations for the loan, and took the note and deed of trust in question as their security, without the indorsement of defendants, or whether they withheld all advances until defendants became indorsers. You can now take that letter with you to your room and study it over for yourselves, and consider further if you can agree upon a verdict.

"I say again, if the advances were not made by Farwell & Co. before the indorsement, then defendants are liable as indorsers, there having been a waiver by them of protest." (Printed record, page 13, transcript 20.)

The Court thus coerced an unwilling jury to give a verdict upon a question that was not really in the case, and tells the jury in his charge that the "real question" was one not raised in the case by the counsel for either party, and not mentioned as a point at all in the case in the instructions asked by the defendants, and which the Court totally refused. (Printed record, page 11, transcript 17, 18, 19.)

Therefore the Court has assumed in this case to decide facts for the jury prejudicially to defendants, and has omitted entirely from his charge those questions of law upon which the jury most needed instruction. The charge of the Court was calculated to mislead the jury. It did mislead them. The verdict was found against defendants upon an issue never raised in the case till the Judge did it in his charge to the jury. Even if it had been an ascertained and established fact that no advances were made by plaintiffs on the

loan to Obermeyer & Co. until defendants became indorsers, yet such fact does not in itself prove that the loan was made on the faith or credit of such indorsement. Hence that was *not* the real question. But the real question in such a case would have been, "Was the loan made on the basis of the land as security, or was the fact that Yaeger & Co. should indorse the paper *made a condition of granting the loan?*" Had the Court put the proposition to the jury in that shape they would have found for defendants, because the proof shows the loan was already made, the deed of trust recorded, and the notes delivered to plaintiffs before defendants were asked to indorse, and then they were not asked to do so as a condition precedent to making advances on the loan, or to make the loan more secure, but as a simple accommodation to plaintiffs, for which plaintiffs would *thank* them, and which was urged on defendants to be done because the plaintiffs assured defendants such indorsement should *do them no harm.* The first notice that defendants would be looked to for payment came in 1870, nearly three years after the maturity of the paper, and after real estate had so declined that the land would no longer realize the debt, *and after the land had been sold for less than its value.* Then for the first time defendants are made aware that they are to be held as indorsers. The *real question* was, "Had there been a protest?" There being no notice, then, "Had there been a waiver of protest?" There is not a particle of testimony in the case showing any such waiver. No fact was proved from which such waiver could be inferred, and when the Court says, "There having been a waiver by them of protest," a material fact was assumed of which there was not a scintilla of proof, and an assertion made that was gratuitous. The charge which the defendants asked the Court to make would have been correct in point of fact and law, and could not have prejudiced either party. The defendants were entitled to show want of consideration under the general issue, as between them and the party claiming to be their indorsees for value.

Schoonmaker vs. Roosa, 17 John, 304.
Pars. Merc. Law, 97.
Chitty on Contracts, 26.
Moore vs. Maddock, 33 Mo., 575.
1 Pars. on Notes and Bills, 176.
Story on Bills, §. 193, 194.
Chitty on Bills, 75.
2 Pars. on Notes and Bills, 25.
Barry vs. Morse, 3, N. H., 132.
Story on Prom. Notes, §. 181.

In refusing to allow Defendants to avail themselves of this defense the court erred.

The letter of the defendants written October 18th, 1867—that being the same day the note matured at Boston—did not justify the court in assuming that defendants thereby waived notice of protest for non payment.

Thornton vs. Wynn, 12 Wheaton, 183, 188.
2 Greenl, Ev., §§. 190–196, note 1.
Kelly vs. Brown, 5 Gray, 108.
Low vs. Howard, 10 Cush., 159.
Same Case, 11 Cush., 268.
Hopkins vs. Liswell, 12 Mass., 52.
Freman vs. Boynton, 7 Id., 483.
Hunt vs. Wedleigh, 26 Maine, 271.
Davis vs. Gower, 17 Id., 387.
Groton vs. Dallheim, 6 Greenl., 476.
Edwards vs. Tandy, 36 N. H., 540.
Woodman vs. Eastman, 10 Id., 359.
Farrington vs. Brown, 7 Id., 271.
Trimble vs. Thorn, 16 John., 152.
Jones vs. Savage, 6 Wend., 658.

Hopley vs. Dufresne, 15 East., 275—where Lord Ellenborough topping the argument, said that the court thought that it should have been eft to the jury to say whether under the circumstances of the case the efendant had notice at the time of his application for indulgence, that there ad been no due presentation, and therefore made the rule absolute for a ew trial.

In the case at bar, the utmost that the defendant's intended to say was, that hey would be responsible for the looking after plaintiff's debt for them, and would see that Kerkhoff should pay it.

The jury should not have been told to take one letter used at the trial, to influence them in their second retirement, without being allowed to have all he letters, for they should have deliberated upon the whole case, not one solated fact connected with it.

Gibson vs. Lair, 37 Mo., 185.
Adams vs. Roberts, 2 Howard, 486.
Scott vs. Lloyd, 9 Peters, 418.
Gaines vs. Stiles, 14 Peters, 322.
McClanahan vs. The Universal Co., 1 Peters, 182.
And the cases above cited.

There was no unequivocal promise to pay the debt with knowledge of plaintiff s' laches, nor is there anything in the proof to show that at the date f the letter to plaintiffs of October 18th, 1867, either that plaintiffs looked to lefendant for payment, or that the defendants considered themselves as responible upon it, further than as plaintiffs' friends, agents and correspondents, o see that Kerkhoff should pay or the money should be collected by foreclosing the deed of trust, which was deemed sufficient by the defendants to pay

the debt at that time. Therefore, this case is to be distinguished from those, such as Sigerson vs. Matthews, 20 How., where after knowledge of the laches, there was an unequivocal promise to pay, and also from those cases where such absolute promise was made before maturity.

The court erred in reading over to the jury the letter of defendants to plaintiffs of date December 10th, 1866, so as to emphasize the words —*"advanced by us"*—not italicized in the original letter, and in the charge to them at that stage of the trial— : namely,

"That this loan might only have been brought about by Yaeger & Co. that they might get back what they had themselves advanced to Obermeyer & Co.,' for there is no evidence to support any such sinister inference to the prejudice of defendants before a jury. The only evidence on the subject was that of Yaeger himself who says: (Page 10 of the printed record)

"The money spoken of as advanced by Yaeger & Co. to Obermeyer & Co. "was none of it advanced until after Farwell & Co. had agreed to make the "loan as mentioned in the correspondence. * * * It was done solely on "the strength of that letter of September 25th, 1866," &c.

Now it was very unfair in the court to create a prejudice against defendants before the jury by imputing to defendants a motive so sinister, and which the jury would have looked upon as unwarranted if the remark had been made by adverse counsel.

But the judge trying a cause is always of great authority with a jury. They naturally look to and rely upon him as impartial and unbiased, and hence his utterances are of more consequence than any other they hear. Hence such a remark coming from a Judge is calculated to mislead, and especially when the manner with which it is said shows too plainly which way the Judge desires the jury to pass upon the facts. If this be not an invasion of the province of the jury, then there is no use in having a jury, for their verdict is at last no more than a reflection of the Judge's will, and it would be safer for parties to know at once that calling a jury is no more than a useless and expensive form, easier dispensed with than invoked. Great latitude is of course allowed in the matter of charging a jury in the United States Circuit Court. But this instance is beyond the limits of those recognized by this Court as proper.

Drakely vs. Gregg, 8 Wallace, 242, 268.
(Opinion of Justice Davis.)
Barney vs Schneider, 9 Wallace, 252.
(Opinion of Justice Miller.)
United States vs. Breitling, 20 How., 252-255.
Tracey vs. Swartwout, 10 Peters, 80.
Adams vs. Roberts, 2 Howard, 486.
Scott vs. Lloyd, 9 Peters, 418.
Greenleaf vs. Birth, 9 Peters, 292.
Etting vs. Bank of United States, 11 Wheat., 59.
United States vs. Tillotson, 12 Wheat., 180.

The case ought to be reversed and tried upon its merits, for up to this time it has not been. What amounts to a waiver of protest is a question of law. The Court undoubtedly might have properly laid down to the jury the constituent elements of a waiver of protest in the legal sense, but the task still remained for the jury to say whether the evidence submitted to them established the state of facts to which that legal sense had application. The Court saved them the trouble, and *decided for the jury the fact to be that defendants had made a waiver of protest.* For a Judge to tell a jury trying a fact that such fact is already found, would be to make the independence of the judiciary something more than sacred.

George C. Strong
of counsel